Supreme Court, U.S.
FILED
JAN 25 2011
OFFICE OF THE CLERK

No. 10-842

# In the Supreme Court of the United States

CLEVELAND CONSTRUCTION, INC.,
*Petitioner*,

v.

CITY OF CINCINNATI,
*Respondent*.

*On Petition for Writ of Certiorari to the Supreme Court of Ohio*

## BRIEF IN OPPOSITION

JOHN P. CURP
CITY SOLICITOR
RICHARD GANULIN
*Counsel of Record*
ASSISTANT CITY SOLICITOR
Room 214, City Hall
801 Plum Street
Cincinnati, OH 45202
(513) 352-3329
(513) 352-1515 Fax
richard.ganulin@cincinnati-oh.gov

*Attorneys for Respondent*

January 25, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## COUNTER STATEMENT OF QUESTION PRESENTED

WHETHER THIS COURT SHOULD UNTIMELY EXERCISE JURISDICTION OVER A PURELY ACADEMIC QUESTION PRESENTED BASED ON FALLACIOUS PREMISES EVEN THOUGH IN 2008 THE SUPREME COURT OF OHIO 1) EXPRESSLY REVERSED THE JUDGMENT OF THE OHIO COURT OF APPEALS AND DID NOT REMAND THE CASE TO THE COURT OF APPEALS FOR FURTHER PROCEEDINGS; 2) EXPRESSLY ISSUED ITS MANDATE TO THE TRIAL COURT TO CARRY ITS JUDGMENT INTO EXECUTION AND EXPRESSLY DENIED THE PETITIONER'S MOTION FOR RECONSIDERATION ON THE SAME EQUAL PROTECTION ISSUE; 3) EXPRESSLY HELD THAT THE PETITIONER DID NOT HAVE A COGNIZABLE EQUAL PROTECTION DAMAGES CLAIM; AND 4) EVEN THOUGH IN CASE NO. 08-601 THIS COURT PREVIOUSLY DENIED CLEVELAND CONSTRUCTION, INC.'S PETITION FOR WRIT OF CERTIORARI CHALLENGING THE SAME EQUAL PROTECTION ISSUE.

## TABLE OF CONTENTS

COUNTER STATEMENT OF QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

STATEMENT OF THE CASE ..... 1

REASONS FOR DENYING THE PETITION .... 8

CONCLUSION ..... 12

APPENDIX

Appendix A: Plaintiff Cleveland Construction, Inc.'s Motion to Set Trial Date for Issues Remanded for New Trial, in the Court of Common Pleas, Hamilton County, Ohio (March 27, 2009) ..... 1b

Appendix B: Judgment Entry, in the Supreme Court of Ohio (SC No. 10-AP-012) (April 21, 2010) ..... 13b

Appendix C: Motion of Appellee Cleveland Construction, Inc., for Clarification of the Court's May 21, 2008 Decision, or, in the Alternative, for Reconsideration (May 30, 2008) ..... 21b

Appendix D: Judgment Entry, in the Supreme Court of Ohio (SC No. 2007-0114) (May 21, 2008) . . . . . 26b

## TABLE OF AUTHORITIES

*Brinkerhoff-Faris Trust & Savings Company v. Hill*,
281 U.S. 673 (1930) . . . . . 12

*Catanzarite v. Boswell*,
2009-Ohio-1211 (Ct. App. 2009) . . . . . 9

*Cleveland Construction v. City of Cincinnati*,
118 Ohio St.3d 283, 888 N.E.2d 1068 (2008) . 6, 8

*Kremer v. Cox*,
114 Ohio App.3d 41, 682 N.E.2d 1006 (1996) . . 9

*Richards, et al. v. Jefferson County, Alabama, et al.*,
517 U.S. 793 (1996) . . . . . 11

*State ex rel. State of Ohio v. Lewis*,
99 Ohio St.3d 97, 789 N.E.2d 195 (2003) . . . . 10

*Trs. of Mich. Laborers' Health Care Fund v. Gibbons*,
209 F.3d 587 (6th Cir. 2000) . . . . . 10

## STATEMENT OF THE CASE

The Petitioner, Cleveland Construction, Inc. ("CCI") did not inform the Court that in 2008 in United States Supreme Court Case No. 08-601 CCI previously filed its first Petition for Writ of Certiorari asking this equal protection question: "Whether the City of Cincinnati, Ohio could deny Cleveland Construction, Inc., the award of a competitively bid contract for the sole purpose of implementing unconstitutional racial requirements and to achieve unconstitutional racial goals." This Court denied CCI's 2008 Petition for Writ of Certiorari in Case No. 08-601.

Nevertheless, notwithstanding that it had no equal protection damages claim, in 2009 CCI filed a motion in the state trial court requesting a trial date for an alleged equal protection damages claim. CCI did not provide its 2009 trial court motion in its Appendix in the case at bar. CCI erroneously argued to the trial court: "The issue remaining for trial is Cleveland's claim for damages flowing from the equal protection violation which Cleveland proved at the initial trial under 42 U.S.C. §1983." City App. 1b-2b, Plaintiff Cleveland Construction, Inc.'s Motion to Set Trial Date. In this most recent iteration of CCI's continuing attempt to pursue its failed bid to the City, the acting Chief Justice of the Supreme Court of Ohio acknowledged that CCI was seeking a damages trial: "From my review of the record before me, it appears that the issue currently on appeal is whether Cleveland Construction is entitled to a damages trial based upon a violation of its federal equal protection rights." Judgment Entry, Supreme Court of Ohio Case No. 10-AP-012, p. 4 (April 21, 2010), City App. 17b-18b. The Supreme Court of Ohio declined to accept

jurisdiction of CCI's 2010 appeal to that Court because it had previously decided that issue in 2008.

CCI knew in 2008 that the Supreme Court of Ohio had denied CCI's equal protection damages claim against the City of Cincinnati. That is why CCI filed a motion for reconsideration in the Supreme Court of Ohio asserting "Appellee would respectfully request that the Court reconsider its Judgment as the Equal Protection portion of this case has never been accepted for review by this Court and is therefore not properly before the Court for decision." Motion for Clarification of the Court's May 21, 2008 Decision, or, in the Alternative, for Reconsideration, p. 3, City App. 24b. The Supreme Court of Ohio denied CCI's motion for reconsideration. CCI's Appendix, 16a. Hence, CCI sought review in this Court in 2008. The following explanation demonstrates that CCI does not have a cognizable equal protection damages claim against the City and is precluded from continuing to argue otherwise.

CCI's Petition is based on its erroneous characterization of the status of the case and presents a purely academic and unnecessary question to the Court. CCI presents arguments and authorities to this Court not presented in its motion to set trial date. In 2005, the Court of Common Pleas denied CCI's alleged equal protection damages claim, the Court of Appeals affirmed that conclusion in 2006, and the Supreme Court of Ohio affirmed again in 2008.

In 2004, CCI was not selected as the contractor for the drywall work at the Cincinnati Convention Center because CCI failed to include in its bid the requisite percentage of *small* business subcontractors. It is

uncontroverted that in 2005 the Court of Common Pleas found the proximate cause of CCI's unsuccessful bid was that specific *small* business subcontracting percentage deficiency and that the City's specific rejection of CCI's bid for the Convention Center work was not based upon an alleged race-based decision.

In 2005, the Court of Common Pleas held:

> *As applied in this case . . . those [alleged] unconstitutional elements did not cause Cleveland to lose the contract award, rather, Valley was awarded the contract because of its higher SBE [Small Business Enterprise] subcontracting percentage as calculated without regard to race or gender.*

Case No. A0402638, Court of Common Pleas Entry dated July 13, 2005; CCI's App. 81a (italics in original) (underscoring added).

The Court of Common Pleas further held:

> *The trial elicited no testimony*, however, that the City in fact gave weight to bidders' compliance with MBE [Minority Business Enterprises] or WBE [Women Business Enterprises] availability estimates in making the contract award with regard to subcontracting percentages. *Plaintiff failed to establish* that City officials looked beyond whether drywall bidders met the City's 35% SBE [race and gender neutral Small Business Enterprise] requirement . . . .*The evidence indicates that the City awarded the contract to Valley, and not to Cleveland, because Valley's*

> *bid complied with the City's [race and gender neutral] requirement that 35 percent of the work go to small business enterprises and Cleveland's bid did not.*

*Id.*, CCI App. 89a (emphasis added).

The Court of Common Pleas again emphasized: ". . . Cleveland has *not* established that the City's race and sex based classifications (as opposed to the City's small business preference) resulted in the loss of the contract award." *Id.*, CCI App. 90a (emphasis added). In 2006, the First District Court of Appeals ratified that finding: "The city's office of contract compliance deemed Cleveland's bid to be unacceptable *due to its failure to achieve 35% SBE participation*." *Id.*, CCI App. 37a (emphasis added). The Court of Appeals acknowledged that "the [trial] court held that Cleveland had failed to establish that the denial of the drywall contract was the result of the race- and gender-based classifications; rather, it held that the denial had been the result of the city's preference for *small* businesses." *Id.*, CCI App. 39a (emphasis added). The Court of Appeals also ruled in 2006 (and CCI did not appeal this adverse ruling to the Supreme Court of Ohio): "In this case, Cleveland alleged that the city employees had violated its rights to due process and equal protection by failing to apply the cap in CMC 321-37 and by rejecting its bid as nonresponsive after applying provisions of a race-conscious program. These allegations were insufficient as a matter of law to describe a violation of a clearly established constitutional right." *Id.*, CCI App. 62a.

The Supreme Court of Ohio sealed the dispositive finding that the proximate cause of the City's rejection

of CCI's bid was CCI's failure to include at least 35% small business subcontractors in the bid: *"Cleveland Construction failed to meet the 35 percent [SBE] requirement*, but did submit the lowest bid. The city ultimately awarded the contract to Valley, the lowest bidder *who also satisfied the SBE requirement* . . . . No property interest is created when a city properly exercises its discretion and does not award a contract *to a party deemed not to have complied with the requirements of the invitation to bid.*" *Id.*, CCI App. 21a, 26a (emphasis added).

Therefore, it is false and erroneous for CCI to continue to argue that it lost the City Convention Center drywall bid as a proximate result of the City's alleged application of race-based procurement requirements. In fact, nothing could be further from the truth. CCI lost the drywall bid because it failed to comply with the mandatory 35% *small* business subcontracting requirement. Consequently, CCI did not suffer an equal protection injury-in-fact sufficient to confer standing on it to continue seeking monetary damages from the City of Cincinnati. This Court should decline jurisdiction for that reason alone.

Furthermore, in its Merit Brief to the Supreme Court of Ohio in the earlier case, CCI argued that the City's ordinance was mandatory and the City allegedly "intentionally enact[ed] a racially preferential legislative scheme directly contrary to law in order to deprive a bidder of a contract *where no discretion exists* in order to achieve the goals of that scheme, *thereby violating the bidder's 14th Amendment equal protection and due process rights*." Cleveland Construction's Merit Brief in Case No. 2007-0114 in the Supreme Court of Ohio, p. 36 (emphasis added). In contrast,

and rejecting CCI's fallacious premise that the City's "lowest and best bid" procurement requirements were mandatory rather than discretionary, the Supreme Court of Ohio ruled: "Clearly, the Cincinnati Municipal Code and the bidding documents are united in emphasizing *the city's broad discretion* to grant or deny contracts. In fact, the city is not required to award a contract at all if it is dissatisfied with any of the submitted bids." CCI App. 24a; 118 Ohio St.3d 283, 284-85, 888 N.E.2d 1068 (2008) (emphasis added).

If there is any question whatsoever that CCI has no surviving equal protection damages claim, that doubt should be extinguished by reference to the 2006 Ohio Court of Appeals decision: "*But in addition to its claim for damages under state law, Cleveland sought damages under federal law, Section 1983, Title 42, U. S. Code, for the city's deprivation of its property interest in the drywall contract.*" CCI App. 53a (emphasis added).The Court of Appeals identified and discussed CCI's *due process* damage claim, the only damage claim before that Court. That was not surprising given the findings by the Court of Common Pleas and the Court of Appeals (later affirmed in 2008 by the Supreme Court of Ohio) that the proximate cause of CCI's failure to gain the Convention Center bid was the bidder's own failure to satisfy the mandatory race-neutral 35% small business subcontracting requirement. In Case No. 07-0114 before the Supreme Court of Ohio, CCI further admitted in its Merit Brief: "While Cleveland did initially pursue a claim for damages under state law, it also sought damages under §1983 *for deprivation of its property interest in the contract without due process of law*." Case No. 2007-0114 in the Supreme Court of Ohio, CCI's Merit Brief, p. 34 (emphasis added).

Therefore, this Court should disregard CCI's attempt to now recreate the procedural and substantive status of this case. CCI is, for the first time, presenting arguments and authorities to this Court not presented in its motion to set trial date filed in the state trial court. City App. 1b-2b, Motion (p. 1) filed March 27, 2009, by CCI in Hamilton County Court of Common Pleas, Case No. A0402638 ("The issue remaining for trial is Cleveland's claim for damages flowing from the equal protection violation which Cleveland proved at the initial trial under 42 U.S.C. §1983"). CCI's alleged equal protection damages claim did not survive the original litigation. Now, under the guise of filing a motion to set trial date for an alleged equal protection damages claim, CCI wants to resurrect and relitigate an issue decided against it several years ago. Without reaching the new academic issue now presented in this appeal, the Court should decline jurisdiction.

Furthermore, the Supreme Court of Ohio's Judgment Entry in CCI's 2008 case justifiably concluded:

> This cause, here on appeal from the Court of Appeals for Hamilton County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed, and judgment is entered for the city, consistent with the opinion rendered herein.

CCI App. 17a.

The 2008 Opinion of the Supreme Court of Ohio was: "The judgment of the court of appeals is therefore

reversed, and judgment is entered for the city. Judgment reversed." CCI App. 27a; 118 Ohio St.3d 283, 288 (¶19), 888 N.E.2d 1068 (2008).

The Supreme Court of Ohio further issued its Mandate in 2008 "to the Court of Common Pleas for Hamilton County to carry this judgment into execution and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry." City App. 27b, Mandate.

It is disingenuous for CCI to now argue that it had a justiciable and cognizable equal protection damages claim related to alleged City conduct occurring in 2004, already reviewed in 2005 by the Court of Common Pleas, 2006 by the First District Court of Appeals, and 2008 by the Supreme Court of Ohio. All reviewing tribunals affirmed that the proximate cause of CCI's loss of the Convention Center drywall bid was CCI's failure to comply with the City's mandatory race-neutral 35% *small* business subcontracting percentage and that CCI did not have an equal protection damages claim.

## REASONS FOR DENYING THE PETITION

The only reasonable interpretation of the Supreme Court of Ohio's mandate in 2008 is that CCI no longer had a viable equal protection damages claim at the time of the mandate because CCI, *in fact*, no longer had a viable equal protection damages claim. It is improper, untimely, and redundant for CCI to again now ask this Court to review the 2008 decision of the Supreme Court of Ohio. CCI already unsuccessfully sought review by this Court in Case No. 08-601. It

cannot again seek review at this late date of the same Supreme Court of Ohio decision.

CCI litigated and lost its claim that the City of Cincinnati had rejected its Convention Center bid for *race-based* reasons. The Court of Common Pleas in 2005, the First District Court of Appeals in 2006, and the Supreme Court of Ohio in 2008 all found that the City denied Cleveland Construction the Convention Center drywall contract for a legitimate *race-neutral* reason: CCI failed to satisfy the mandatory *race-neutral* 35% *small* business subcontracting requirement. That was the proximate cause of its failure to successfully bid. Therefore, CCI did not have a justiciable and cognizable equal protection damages claim against the City. That should have been the end of CCI's false allegations that it was deprived of the Convention Center drywall contract for race-based reasons.

The City presented multiple additional grounds to the Court of Common Pleas and the First District Court of Appeals for denying CCI's motion to set trial date. The first ground was that Rule 14(A), Hamilton County Court of Common Pleas Local Rules of the Court, requires that all motions "shall be accompanied by a memorandum in support of the motion which shall be a brief statement of the grounds for the same, with all citations of authorities relied upon . . . ." CCI failed to provide any citations of authorities whatsoever in its motion to set a trial date for an alleged equal protection damages claim. Failure to comply with rules may be "fatal." *Catanzarite v. Boswell*, 2009-Ohio-1211 at ¶16 (Ct. App.), quoting *Kremer v. Cox*, 114 Ohio App.3d 41, 60, 682 N.E. 2d 1006 (1996).

The City further argued that it is illogical for CCI to argue that the Supreme Court of Ohio effectively remanded its alleged equal protection monetary damages claim for further proceedings because the Supreme Court of Ohio expressly declined to resolve, as moot, whether a disappointed bidder in Ohio can recover lost profits in a §1983 action.

Moreover, the Supreme Court of Ohio held that when it issues a mandate the Court means what it says in the mandate. In *State ex rel. State of Ohio v. Lewis*, (99 Ohio St.3d 97, 103, 789 N.E.2d 195 (2003) (emphasis in original)) the Supreme Court of Ohio emphasized that it "*did not* remand the cause for *further proceedings*." The Court was clear: "*In fact, if we had intended a remand for further proceedings in this litigation, we would have expressly provided for that action*." *Id.* (emphasis added). Similarly, federal appellate courts have the authority to order summary judgment based upon the record even where an appellant had not moved for summary judgment. *Trs. of Mich. Laborers' Health Care Fund v. Gibbons*, 209 F.3d 587, 594-95 (6th Cir. 2000).

The Supreme Court of Ohio plainly reversed the judgment of the Court of Appeals and just as plainly ordered that "judgment is entered for the city. Judgment reversed." CCI passionately, but unsuccessfully, sought reconsideration before the Supreme Court of Ohio on the exact alleged equal protection damages issue it continues to collaterally litigate today. The Supreme Court of Ohio heard CCI's claim and expressly rejected it.

The Supreme Court of Ohio could have ruled in 2008, as it often does, that "this cause is remanded" or

"judgment reversed and cause remanded." It made sense, however, that the Court did not remand the case for a trial on an alleged equal protection damages claim because CCI no longer had a justiciable and cognizable equal protection damages claim and the Court had declined to decide whether a disappointed bidder could recover lost profits.

CCI's entire case was predicated upon its own specific interpretation of the Cincinnati Municipal Code. However, the Supreme Court of Ohio rejected that interpretation and held: "Clearly, the Cincinnati Municipal Code and the bidding documents are united in emphasizing the city's broad discretion to grant or deny contracts. In fact, the city is not required to award a contract at all if it is dissatisfied with any of the submitted bids." CCI App. 24a. The lower courts concluded in 2005, 2006, and 2008, respectively, that CCI lost its Convention Center bid for race-neutral reasons. CCI's equal protection damages claim was previously decided adverse to CCI and may not be resurrected at this late date. Furthermore, in 2008 the Supreme Court of Ohio lawfully and logically issued an opinion, judgment, and mandate and denied (by 6-1 vote) CCI's motion for reconsideration on the exact equal protection issue now again presented to this Court in the guise of a newly-constituted alleged due process claim.

Finally, the cases cited by CCI in its Petition are plainly inapposite. Unlike CCI in the case at bar, *Richards, et al. v. Jefferson County, Alabama, et al.*, 517 U.S. 793 (1996), concerned individuals who were not parties to prior litigation and could not, therefore, be bound. Also unlike the procedural remedies available to CCI, and CCI's repeated advocacy of its

equal protection position in the case at bar, the plaintiff in *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673 (1930), was deprived of all procedural remedies.

The new due process issue presented by CCI is purely academic and unnecessary. CCI lost its equal protection damages claim in the earlier litigation in a logical and reasonable trial court decision in 2005, a state appellate decision in 2006, and a Supreme Court of Ohio decision in 2008. The lower courts properly denied CCI's motion to set trial date for an alleged equal protection damages claim. This Court should decline jurisdiction.

## CONCLUSION

In 2008, the Supreme Court of Ohio correctly concluded that CCI did not have a justiciable and cognizable equal protection claim against the City of Cincinnati. The Supreme Court of Ohio held that the City denied CCI's 2003 bid for drywall work at the Convention Center due to CCI's failure to comply with the City's race-neutral small business requirements. CCI then unsuccessfully sought review in this Court in Case No. 08-601 on its alleged equal protection claim (Second Question Presented by CCI in Case No. 08-601: "Whether the City of Cincinnati, Ohio could deny Cleveland Construction, Inc., the award of a competitively bid contract for the sole purpose of implementing unconstitutional racial requirements and to achieve unconstitutional racial goals"). CCI, therefore, has no standing or substantive right to now once again seek a trial for monetary damages for an alleged equal protection claim. This Court should decline jurisdiction in this case.

Respectfully submitted,

John P. Curp
*City Solicitor*
Richard Ganulin
*Counsel of Record*
Assistant City Solicitor
Room 214, City Hall
801 Plum Street
Cincinnati, OH 45202
(513) 352-3329
(513) 352-1515 Fax
richard.ganulin@cincinnati-oh.gov
*Attorneys for Respondent*

# APPENDIX

# APPENDIX

## TABLE OF CONTENTS


Appendix A: Plaintiff Cleveland Construction, Inc.'s Motion to Set Trial Date for Issues Remanded for New Trial, in the Court of Common Pleas, Hamilton County, Ohio (March 27, 2009) ..... 1b

Appendix B: Judgment Entry, in the Supreme Court of Ohio (SC No. 10-AP-012) (April 21, 2010) ..... 13b

Appendix C: Motion of Appellee Cleveland Construction, Inc., for Clarification of the Court's May 21, 2008 Decision, or, in the Alternative, for Reconsideration (May 30, 2008) ..... 21b

Appendix D: Judgment Entry, in the Supreme Court of Ohio (SC No. 2007-0114) (May 21, 2008) ..... 26b

## APPENDIX A

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A0402638

Judge Metz

[Filed March 27, 2009]

| | |
|---|---|
| CLEVELAND CONSTRUCTION, INC., | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| vs. | ) |
| | ) |
| CITY OF CINCINNATI, et al. | ) |
| | ) |
| Defendants. | ) |
| | ) |

**PLAINTIFF CLEVELAND CONSTRUCTION, INC.'S MOTION TO SET TRIAL DATE FOR ISSUES REMANDED FOR NEW TRIAL**

**MOTION**

Plaintiff Cleveland Construction, Inc. ("Cleveland") moves the Court to set a trial date for the issues upon which the Hamilton County First District Court of Appeals reversed and remanded and which were not accepted for review by the Supreme Court of Ohio. The

issue remaining for trial is Cleveland's claim for damages flowing from the equal protection violation which Cleveland proved at the initial trial under 42 U.S.C. § 1983. This issue was not accepted for review by the Supreme Court of Ohio and is still subject to the remand of the Court of Appeals for a new trial.

Respectfully submitted,

/s/ W. Kelly Lundrigan
W. Kelly Lundrigan (0059211)
STATMAN, HARRIS & EYRICH, LLC
3700 Carew Tower, 441 Vine Street
Cincinnati, Ohio 45202
Phone: (513) 621-2666
Fax: (513) 621-4896
E-mail: klundrigan@statmanharris.com
***Counsel for Plaintiff Cleveland Construction, Inc.***

## I. Introduction

Because the Court is new to this matter, Cleveland will provide a statement of the long history of this case. This is necessary in order to explain what remains for trial. These facts are taken from the trial court's original Decision and Judgment, and the Entry and Decision of the First District Court of Appeals, which are attached as Exhibits A and B, respectively.

## II. History of the Case

### A. Facts

Cleveland was the lowest bidder for the drywall contract on the Cincinnati Convention Center Expansion and Renovation Project, ("the project"). Bidders on the project were subject to the City's Small Business Enterprise ("SBE") program. The City's SBE program required "subcontracting outreach" of all bidders. Bidders had to subcontract a certain percentage of their contract to "small businesses," and in doing so, the bidders were required to make a "good faith effort" to "obtain the maximum practicable participation by small, minority and women–owned business enterprises" in the subcontracted portion of their bid. Prior to submitting bids, the bidders were given an "Availability Estimation" by the City which estimated the availability of minority and women drywall subcontractors in relation to the percentage in which the City indicated they should be reflected in the subcontracted portion of a bidder's bid. Bidders were told by the City in a summary of the subcontracting requirements that: "Bidders should be able to include minority and female firms at the level of availability indicated," and that the City expected

"the utilization of SBEs to be reflective of the availability estimates." The City admitted that it lacked any factual predicate that could satisfy "strict scrutiny" review of a race-conscious program, but claimed that its SBE program was race-neutral.

The sole reason Cleveland was not awarded the contract is that it did not meet the 35% subcontracting requirement. Instead, Valley Interior Systems, Inc., ("Valley"), was awarded the contract because it met (and in fact exceeded) the 35% subcontracting requirement, although Valley's bid was 1.2 Million Dollars higher in price than Cleveland's.[1] All of Valley's small business enterprise subcontractors were also minority business enterprises.

**B. The First Trial**

Cleveland was successful in proving a violation of its equal protection rights at trial and obtained prospective injunctive relief to prevent the City from applying the race conscious provisions of its SBE program in the future, and Cleveland was awarded its attorney's fees as a prevailing party. The basis for Cleveland's second constitutional claim, upon which it was also successful at trial, was that the City violated Cleveland's constitutional procedural due process rights. Cleveland argued that the City had no discretion under the City code to award to any bidder other than Cleveland if it awarded the contract on the basis of the bidders meeting the subcontracting requirement of the SBE program. The City was

---

[1] A third bidder, Kite, was higher in price than Valley but also met the subcontracting requirement of the SBE program.

restricted by its code (Cincinnati Municipal Code 321-37(c)(4)) from awarding the contract to a bidder higher in price by more than 10% or $50,000.00 than the lowest bidder if the basis for the award was to be that bidder's compliance with the subcontracting outreach requirement of the SBE program. Although the City in fact awarded the contract to Valley because Valley met the subcontracting requirements of the SBE program, the City did not apply the restriction of Cincinnati Municipal Code 321-37(c)(4) in making the award.

Cleveland filed suit on March 30, 2004 when it learned of the contract award to Valley, alleging violation of both its constitutional rights to due process and equal protection under 42 U.S.C. § 1983, as well as under state law for the City's abuse of discretion in violating its own code restriction, Cincinnati Municipal Code 321-37(c)(4). Cleveland requested money damages, declaratory judgment, temporary, preliminary and permanent injunctive relief, and its attorney's fees under 42 U.S.C. § 1988.

As the basis for its finding of an as-applied equal protection violation, (in addition to its finding that the SBE Program was facially violative of the Equal Protection Clause), the trial court found that the City's SBE Program "contains a variety of elements through which the City makes classifications by race and sex and "indisputably pressures" contractors to recruit and use subcontractors on those terms."[2] The Court further found that the City's "Good Faith Efforts" requirement "to obtain the maximum practicable participation by

---

[2] Decision of Trial Court, Exhibit A, p. 13-15.

small, minority and women-owned business enterprises on this project," the City's percentage "Availability Estimation," and statements in the bid documents given to bidders that "Bidders should be able to include minority and female firms at the level of availability indicated," and "If the availability estimates are not met, it does not mean that the bid will be deemed non-responsive. However we expect the utilization of SBEs to be reflective of the availability estimates" had the effect of "indisputably pressuring" discrimination based upon race as-applied in this case:

> ***Thus, in the process of soliciting bids, the City did in those respects pressure and encourage bidders to draw upon race and sex-based classifications...***[3]

After Cleveland presented its case to a jury, the trial court directed a verdict against Cleveland on its damage claims for both the alleged equal protection violation as well as the alleged due process violation. The trial court directed a verdict on damages because it found that in Ohio, money damages against a city under 42 U.S.C. § 1983 for either a due process violation or an equal protection violation arising from a competitive bidding scenario are only available to the extent that injunctive relief is unavailable as a remedy. Because the court found Cleveland had not carried its burden of proof on its request to enjoin construction of the then ongoing project by failing to prove the degree of completion of the drywall portion of the project in its case-in-chief, the court found that Cleveland was not entitled to damages.

---

[3] *Id* at 15.

### C. Cleveland Appeals the Directed Verdict on Damages to the First District Court of Appeals, the Directed Verdict is Reversed and the Case is Remanded for a New Trial on Damages.

The City appealed the trial court's decision to the First District Court of Appeals and Cleveland filed a cross-appeal. The First District Court of Appeals reversed the trial court's directed verdict on Cleveland's damage claims arising from both its claims of an equal protection violation as well as a due process violation under 42 U.S.C. § 1983, upholding the findings that the City violated Cleveland's rights to equal protection as well as due process and Cleveland's entitlement to attorney fees under 42 U.S.C. §1988. Specifically, for purposes of what is under consideration here, the First District Court of Appeals sustained Cleveland's First, Fourth and Sixth Assignments of Error with regard to the directed verdict on Cleveland's equal protection damage claims.[4] Those Assignments of Error which relate to Cleveland's damage claims, and the Issues Presented for Review with them, are reproduced here for the convenience of the Court:

> First Assignment of Error:
> The Trial Court Erred in Directing a Verdict in Favor of the City on Cleveland's Damage Claims.

---

[4] Decision and Entry of First District Court of Appeals dated December 8, 2006, attached as Exhibit B, p. 21, 26.

First Issue Presented For Review:
Where Violations of a Bidder's Constitutional 14th Amendment Equal Protection and Due Process Rights Are Proven to be Caused By a Municipality's Ordinances Relating to Competitive Bidding, that Bidder is Afforded a Damage Remedy by 42 U.S.C. §1983

Second Issue Presented For Review:
There Is No Requirement That a Bidder Who Is Unconstitutionally Deprived Of a Public Competitively Bid Contract Seek Injunctive Relief as a Prerequisite To Obtaining a Damage Award Under 42 U.S.C. §1983.

Third Issue Presented For Review:
The Trial Court's Holding That Damages Under 42 U.S.C. §1983 Are Only Available As A Remedy To The Extent An Injunction Is Not Available Violates The Supremacy Clause

Fourth Issue Presented For Review:
A Plaintiff Requesting Injunctive Relief Against The Illegal Award Of A Contract Is Not Required To Produce Evidence In His Case In Chief Of Equities Favoring The Defendants To Allow The Court To Balance Such Equities At The Close Of Plaintiff's Case, Or Risk Being Subject To A Directed Verdict On His Legal Damage Claims

Fifth Issue Presented For Review:
Damage Remedy Of Lost Profits Is Available To A Bidder Who Proves A Conscious Disregard By a Municipality Of Its Own Competitive Bidding Laws Under State Law Where That Bidder Sought Equitable Relief Multiple Times Which Was Erroneously Denied.

Fourth Assignment of Error:
The Trial Court Erred by Denying Cleveland's Motion for a New Trial.

Issue Presented For Review:
Where A Trial Court's Judgment Is Contrary To Law And Based Upon An Error Of Law, Which Is Pointed Out To The Trial Court, A Motion For New Trial Should Be Granted To Allow Correction Of Such Errors

Sixth Assignment of Error:
The Trial Court Erred in Making Findings of Causation of Damages Which Should Have Been for the Jury if the Court Had Not Directed a Verdict on Cleveland's Legal Damage Claims.

Issue Presented For Review:
Where The Trial Court Grants A Directed Verdict On Plaintiff's Damage Claims And Takes Those Claims From The Jury, It Is Error For The Trial Court To Proceed To Make Findings As To A Lack Of Proximate Cause Of Any Damages To Plaintiff.

The First District Court of Appeals sustained each of these Assignments of Error, and found that 42 U.S.C.

§ 1983 contains no limitation on damages of the sort imposed by the trial court and remanded the case for a new trial on damages on both Cleveland's claims of an equal protection violation as well as its claim of a due process violation.

### D. The City's Appeal to the Supreme Court of Ohio and the Finding of a Property Interest in the Contract and a Procedural Due Process Violation is Reversed.

The City filed a discretionary appeal to the Supreme Court of Ohio. The Supreme Court of Ohio accepted two of five issues presented for review by the City, but declined to exercise jurisdiction over the lower courts' decisions in Cleveland's favor on Cleveland's equal protection claims, including the decision of the First District Court of Appeals reversing the trial court's granting of a directed verdict on Cleveland's claim for damages for the equal protection violation which it proved at trial.[5] The two issues accepted for review were:

(1) Under Ohio law, a disappointed bidder for a City of Cincinnati public contract does not have a constitutionally protected property interest in that contract; and

---

[5] In fact, the Supreme Court of Ohio denied review of the equal protection findings of the lower courts not once, but twice. The City attempted to file a motion to add a proposition of law after the Ohio Supreme Court had issued its decision accepting the two due process issues for review, again attempting to persuade the court to review the lower courts' holdings on the equal protection claims. It was again denied.

(2) A disappointed bidder for a public contract in Ohio cannot recover lost-profit damages in a 42 U.S.C. 1983 action alleging a deprivation of procedural due process.[6]

The City did not attempt to appeal the attorney's fee award in favor of Cleveland upheld by the First District Court of Appeals to the Supreme Court of Ohio.

The Supreme Court of Ohio reversed the two lower courts on the two issues it accepted for review in a decision issued on May 21, 2008, holding that no property interest in the contract was created in favor of Cleveland by the City's Municipal Code, and therefore constitutional procedural due process protection was not at issue with regard to Cleveland's unsuccessful bid. Cleveland's Motion for Reconsideration was denied by the Supreme Court of Ohio on August 6, 2008.

### E. A Trial on Cleveland's Damages From the Established Equal Protection Violation Remains Pending From the Remand of the First District Court of Appeals.

The Supreme Court of Ohio addressed only the equal protection half of Cleveland's damage claims.

---

[6] The first two pages of the City's Memorandum in Support of Jurisdiction which evidence the five (5) Propositions of Law submitted to the Supreme Court of Ohio by the City are attached as Exhibit C, and the Decision of the Supreme Court of Ohio accepting review of two (2) of those issues is attached as Exhibit D.

There remains a separate claim for damages for the equal protection violation found by the trial court and upheld by the First District Court of Appeals, which remanded for a damage trial on that claim. Cleveland respectfully requests that the Court set a trial date on its claims for damages for the equal protection violations proved at the first trial in accordance with the order remanding the case of the First District Court of Appeals.

## III. Conclusion

Cleveland respectfully requests that the Court set a date for trial and an accompanying schedule for this case for the reasons set forth herein.

Respectfully submitted,

/s/ W. Kelly Lundrigan
W. Kelly Lundrigan (0059211)
STATMAN, HARRIS & EYRICH, LLC
3700 Carew Tower, 411 Vine Street
Cincinnati, Ohio 45402
Phone: (513) 621-2666
Fax: (513) 621-4896
E-mail: klundrigan@statmanharris.com
***Counsel for Plaintiff Cleveland Construction, Inc.***

[*Certificate of Service Omitted in Printing this Appendix*]

* * *

# APPENDIX B

## IN THE SUPREME COURT OF OHIO

**Court of Appeals Case No. C-0900419**

**Supreme Court Case No. 10-AP-012**

**[Filed April 21, 2010]**

| | |
|---|---|
| CLEVELAND CONSTRUCTION, INC., | ) |
| | ) |
| Appellant, | ) |
| | ) |
| vs. | ) |
| | ) |
| CITY OF CINCINNATI, | ) |
| | ) |
| Appellee. | ) |
| | ) |

From the Hamilton County Court of Appeals

**Judgment Entry**

W. Kelly Lundrigan, counsel for appellant Cleveland Construction, has filed an affidavit with the Clerk of this Court under R.C. 2501.13 seeking the disqualification of Judge William L. Mallory, Jr. from acting on any further proceedings in Case No. C-0900419 in the Hamilton County Court of Appeals.

Lundrigan alleges that Judge Mallory has a conflict of interest in the underlying appeal because the judge's brother is Mark Mallory, the mayor of Cincinnati. Lundrigan states that the subject of the appellate case is Cincinnati's Small Business Enterprise ("SBE") Program, and more specifically rules and guidelines that require bidders of public contracts to use good faith efforts to promote opportunities for minority- and women-owned businesses. Lundrigan notes that the trial court issued a permanent injunction that prohibits the city from implementing the race- and gender-based classifications in its SBE rules, and he asserts that the issue before the appellate court is whether any of the race-conscious provisions of the SBE Program remain subject to the injunction. According to Lundrigan, Mayor Mallory is directly involved in the issue before the court of appeals because the mayor has been under political pressure to increase participation of minority- and women-owned businesses in contracts awarded under the city's SBE Program. He alleges that Judge Mallory cannot be impartial and unbiased in deciding this case because the judge's brother is directly involved in the SBE Program and its implementation, including the very issues that are at stake in this case.

Judge Mallory has responded in writing to the concerns raised in the affidavit of disqualification. The judge notes that it is his practice to recuse himself from cases where his brother is (1) named individually or in his capacity as mayor, or (2) involved as a policymaker or as a witness. The judge states that when he reviewed the briefs and record of the case, he found no indication of a conflict of interest. Judge Mallory also notes that the two other judges on the panel raised no concerns about a conflict. According to

the judge, the controversy between the City of Cincinnati and Cleveland Construction pertains to the expansion of the Cincinnati Convention Center and, moreover, his brother was not mayor at the time of the expansion or when Cleveland Construction submitted bids that resulted in the filing of their lawsuit.

The City of Cincinnati has also responded to the affidavit of disqualification. The city disputes Lundrigan's claim that the appeal concerns injunctive relief. Rather, the city maintains that the basis for appeal is the trial court's denial of Cleveland Construction's motion for new trial for damages stemming from Cleveland's alleged equal protection violation under 42 U.S.C. Section 1983. The city alleges that Cleveland Construction is trying to create an equal protection damages claim that does not exist. The city takes no position on the issue of Judge Mallory's requested disqualification.

## Procedural History

The underlying appellate case arises out of the expansion of the Cincinnati Convention Center, a large-scale public project with an estimated budget of $145 million. Cleveland Construction filed suit when the drywall contract on the project was awarded to another bidder, alleging that the SBE Program was unconstitutional and in violation of Section 1983, Title 42, U.S. Code. The trial court initially directed a verdict in favor of the city and the successful bidder on Cleveland Construction's claim for lost profits. Following a bench trial, the trial court also determined that (1) the city had deprived Cleveland Construction of a protected property interest in the drywall contract without providing due process, and (2) the SBE

Program, which required bidders to use good-faith efforts to promote opportunities for minority- and women-owned businesses, violated the Equal Protection Clause of the United States Constitution by creating impermissible race- and gender-based classifications. The trial court also enjoined the city from maintaining or applying race- and gender-based classifications in its SBE Program. While no damages were awarded due to the directed verdict, Cleveland Construction was awarded attorney fees and costs as the prevailing party.

Cleveland Construction filed an appeal and the city cross-appealed. The First District Court of Appeals reversed the trial court directed verdict on Cleveland Construction's lost-profit claim under Section 1983, and remanded for a new trial on the issues of liability and damages. The court of appeals affirmed the trial court's judgment in all other respects. See *Cleveland Construction, Inc. v. City of Cincinnati*, 169 Ohio App.3d 627, 2006-Ohio-6452, 864 N.E.2d 116.

This court subsequently accepted the city's discretionary appeal, but only on two issues relating to the alleged violation of due process under Section 1983. On May 21, 2008, we reversed the judgment of the court of appeals, holding that the city did not violate Cleveland Construction's due-process rights because Cleveland had no protected property interest in the drywall contract. Because a property interest is a necessary prerequisite to maintaining a Section 1983 action for deprivation of due process, we declined to address whether a disappointed bidder can recover lost profits in a Section 1983 action. *Cleveland Construction, Inc. v. City of Cincinnati*, 118 Ohio St.3d 283, 2008-Ohio-2337, 888 N.E.2d 1068.

Following our decision, Cleveland Construction filed a "Motion to Set Trial Date for Issues Remanded for New Trial." Cleveland Construction's motion is premised on its belief that there remains a viable damages claim stemming from the trial court's finding that the race- and gender-based classifications in the city's SBE Program violated equal protection. In its motion for new trial, Cleveland Construction noted that this court declined to accept jurisdiction over the lower court's decisions in Cleveland Construction's favor on its equal protection claims, deciding to address only the issues that related to due process. The trial court, however, denied Cleveland Construction's new trial motion. This affidavit proceeding concerns whether Judge Mallory may hear the appeal of that decision.

The Merits of the Affidavit

At the outset, I note the apparent confusion among the parties regarding what matters are at issue before Judge Mallory and the other judges on the appellate panel. Judge Mallory and the attorneys for Cleveland Construction and the City of Cincinnati disagree as to the exact issues that remain for the court of appeals to resolve. This confusion stems, no doubt, from the various rulings of the trial court, the court of appeals in the first appeal, and this court. Nevertheless, although it is not entirely clear whether Cleveland Construction's equal protection claim is still alive or was extinguished by these prior rulings, that question is not dispositive for purposes of this affidavit-of-disqualification proceeding.

From my review of the record before me, it appears that the issue currently on appeal is whether

Cleveland Construction is entitled to a damages trial based upon a violation of its federal equal protection rights. After careful review of the affidavit and the judge's response as they relate to the issue on appeal, I conclude that attorney Lundrigan has failed to meet his burden of proving that a bias, prejudice, or other disqualifying interest that requires the judge's removal exists in this case.

Rule 2.11(A)(2)(c) of the Code of Judicial Conduct provides that a judge shall disqualify himself or herself in any proceeding in which the "judge *knows* that * * * a person within the *third degree of relationship* * * * [h]as more than a *de minimis* interest that could be substantially affected by the proceeding." (Emphasis sic.) Lundrigan, however, has not demonstrated clearly that the judge's brother has an interest that could be *substantially* affected by the proceeding. Although there have been cases in which the participation of a judge in a case that directly or indirectly involves the interest of another public official has mandated the disqualification of that judge, see e.g. *In re Disqualification of Corrigan*, 110 Ohio St.3d 1217, 2005-Ohio-7153, 850 N.E.2d 720, the record does not support such a finding in this case. Even if Cleveland Construction's success or failure on its motion for a damages trial on its equal-protection claim implicates the very aspects of the SBE Program that the mayor has been promoting, what has not been shown is whether the mayor faces any direct or indirect benefit or loss from the out come of Cleveland Construction's appeal.

Moreover, Judge Mallory has denied the existence of a conflict of interest involving his brother in this appeal, and the other judges on the appellate panel are

apparently in agreement with the judge on this issue. "And though a judge's subjective belief as to his or her own impartiality is generally not the decisive factor in deciding a disqualification request, the judge's own assessment is certainly entitled to some weight." *In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, 884 N.E.2d 1082, ¶ 11.

I also reject attorney Lundrigan's argument that Mayor Mallory, "as the 'official head and representative of the city for all purposes' is an 'officer, director, general partner, managing member, or trustee of a party' for purposes of the Code of Judicial Conduct, Rule 2.11(A)(2)(a).'" I do not read Rule 2.11(A)(2)(a) as requiring the disqualification of Judge Mallory solely because his brother is the duly elected mayor of a large city. The disqualification of Judge Mallory based on this rule would require the judge's disqualification from any case involving the City of Cincinnati as long as his brother is mayor, even if no interest or conflict is shown. Such a result would be impractical and unjustified.

"A judge is presumed to follow the law and not to be biased, and the appearance of bias or prejudice must be compelling to overcome these presumptions." *In re Disqualification of George*, 100 Ohio St.3d 1241, 2003-Ohio-5489, 798 N.E.2d 23, ¶ 5. Nothing in the affidavit or in Judge Mallory's response suggests to me that the "presumption of impartiality that is accorded all judges," *In re Disqualification of Celebrezze*, 101 Ohio St.3d 1224, 2003-Ohio-7352, 803 N.E.2d 823, ¶ 7, has been overcome in this case.

For the reasons stated above, the affidavit of disqualification is denied. The case may proceed before Judge Mallory.

Dated this 21st day of April, 2010.

/s/ Paul E. Pfeifer
PAUL E. PFEIFER
Acting Chief Justice

Copies to: Kristina D. Frost, Clerk of the Supreme Court
Hon. William L. Mallory, Jr.
✓ Hamilton County Clerk of Courts
W. Kelly Lundrigan, counsel for appellant
Richard Ganulin, counsel' for appellee

## APPENDIX C

IN THE SUPREME COURT OF OHIO

CASE NO. 2007-0114

APPEAL NO. C050749
APPEAL NO. C050779
APPEAL NO. C050888
(Consolidated)

COURT OF APPEALS
FIRST APPELLATE DISTRICT
TRIAL COURT NO. A-0402638

[Filed May 30, 2008]

CLEVELAND CONSTRUCTION, INC.,

Plaintiff-Appellee,

vs.

CITY OF CINCINNATI,

Defendant-Appellant.

**MOTION OF APPELLEE CLEVELAND CONSTRUCTION, INC., FOR CLARIFICATION OF THE COURT'S MAY 21, 2008 DECISION, OR, IN THE ALTERNATIVE, FOR RECONSIDERATION**

W. KELLY LUNDRIGAN (0059211)
Counsel of Record
Statman Harris & Eyrich LLC
Carew Tower
441 Vine Street
Suite 3700
Cincinnati, Ohio 45202
(513) 621-2666
Fax (513) 621-4896
klundrigan@statmanharris.com

*Counsel for Plaintiff-Appellee*
*Cleveland Construction, Inc.*

JULIA L. McNEIL (0043535)
RICHARD GANULIN (0025642)
MARY FRANCES CLARK (0077497)
Room 214 City Hall
801 Plum Street
Cincinnati, OH 45202
(513) 352-3329
Fax: (513) 352-1515
richard.ganulin@cincinnati-oh.gov

*Counsel for Defendant-Appellant*
*City of Cincinnati*

## MOTION

Appellee Cleveland Construction, Inc. ("Appellee") moves this Court to clarify its May 21, 2008 Judgment for the reasons explained below. In the alternative, Appellee requests that the Court reconsider its decision pursuant to Ohio Supreme Court Rule of Practice XI, Section 2.

Respectfully submitted,

/s/ Kelly Lundrigan
W. Kelly Lundrigan (0059211)
Counsel of Record
Statman Harris & Eyrich LLC
Carew Tower
441 Vine Street
Suite 3700
Cincinnati, Ohio 45202
(513) 621-2666
Fax (513) 621-4896
klundrigan@statmanharris.com

*Counsel for Plaintiff-Appellee*
*Cleveland Construction, Inc.*

## MEMORANDUM

In an apparent oversight, the Judgment contained in the Court's Opinion of May 21, 2008 would seem, on its face, to reverse the judgment of the Ohio First District Court of Appeals ("the First District") dated December 8, 2006 in its entirety and to enter judgment in favor of Appellant City of Cincinnati ("Appellant") on all of Appellee's claims. However, this Court

accepted jurisdiction only over that portion of the First District's decision relating to Appellee's Due Process claims, but did not accept jurisdiction over the portion of the First District's Judgment relating to Plaintiff's claims for Equal Protection violations, which the First District remanded for a new trial on issues of liability and damages under 42 U.S.C. § 1983. (December 8, 2006 Decision of First District, p. 21, sustaining Appellant's (Cleveland's) Fourth and Sixth Assignments of Error, and p. 26). In fact, this Court denied not one, but also a second attempt by Appellant to specifically have the Equal Protection portion of the case reviewed by this Court.

The Judgment of this Court should, therefore, reflect that the Judgment of the First District is reversed in part, that Judgment for the Appellant is entered on Appellee's Due Process claims, and that the case is remanded to the Hamilton County Court of Common Pleas for further proceedings in accordance with this Court's Judgment and the portion of the Judgment of the First District which relates to Appellee's claims for Equal Protection violations.

In the event that the Court does not consider the wording of its Judgment to be an erroneous oversight as to this point, Appellee would respectfully request that the Court reconsider its Judgment as the Equal Protection portion of this case has never been accepted for review by this Court and is therefore not properly before the Court for decision. Appellee would request briefing and a hearing on the Equal Protection portion of the case prior to any decision on that portion of the case by this Court.

Appellee respectfully requests that this Court clarify its Opinion and Judgment of May 21, 2008 to reflect that the Judgment of the Ohio First District Court of Appeals is reversed in part, that Judgment for the Appellant is entered only as to Appellee's claims of Due Process violations with regard to Appellee's claims to a constitutionally protected property interest in the contract at issue, and that the case is remanded to the Hamilton County Court of Common Pleas for further proceedings in accordance with this Court's Judgment and the portion of the Judgment of the First District which relates to Appellee's claims for Equal Protection violations which were not accepted for review by this Court.

Respectfully submitted,

/s/ Kelly Lundrigan
W. Kelly Lundrigan (0059211)
Counsel of Record
Statman Harris & Eyrich LLC
Carew Tower
441 Vine Street
Suite 3700
Cincinnati, Ohio 45202
(513) 621-2666
Fax (513) 621-4896
klundrigan@statmanharris.com

*Counsel for Plaintiff Appellee*
*Cleveland Construction, Inc.*

*[Certificate of Service Omitted in Printing of this Appendix]*

* * *

## APPENDIX D

## IN THE SUPREME COURT OF OHIO

**Case No. 2007-0114**

**[Filed May 21, 2008]**

| | |
|---|---|
| Cleveland Construction, Inc. | ) |
| | ) |
| v. | ) |
| | ) |
| City of Cincinnati, and Timothy Riordan, Bernadine Franklin, Nate Mullaney, Alicia Townsend, Kathi Ranford, and Valley Interior Systems, Inc. | ) |

APPEAL FROM THE COURT OF APPEALS
A0402638

### JUDGMENT ENTRY

This cause, here on appeal from the Court of Appeals for Hamilton County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed, and judgment is entered for the city, consistent with the opinion rendered herein.

It is further ordered that costs are assessed pursuant to S.Ct.Prac.R XI(5) and that a mandate be

sent to the Court of Common Pleas for Hamilton County to carry this judgment into execution and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

(Hamilton County Court of Appeals; Nos. C050749, C050779, and C050888)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

I CERTIFY that this document is a true and accurate copy of the judgment entry of the Supreme Court of Ohio filed on May 21, 2008 in Case No. 2007-0114 and constitutes the mandate of the Court under S. Ct. Prac. R. XI, Section 4.

In witness, I have subscribed my name and affixed the seal of the Supreme Court of Ohio on this 6th day of August, 2008.

Clerk of Court
by Kim Radcliffe, Deputy Clerk